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No. 92-785

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,

*Petitioner,*

v.

STATE WATER RESOURCES CONTROL BOARD, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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Respondents' Brief in Opposition ("Opposition" or "Opp.") confirms that a grant of certiorari in this case is both appropriate and necessary to resolve a continuing conflict among the Circuits:

1. The Opposition does not dispute that a widespread conflict exists among the Circuits with respect to the interpretation of this Court's decisions concerning the right to statutory attorneys' fees for work performed in related administrative and state proceedings. As we have pointed out (Pet. 15-20), the First, Third and Seventh Circuits have approved awards where resort to the collateral proceeding was nonmandatory, while the decision below, like those of the Second, Fifth and Tenth Circuits, has held that such awards are unavailable unless the collateral

proceedings were required by statute or court order. Neither the existence, nor the significance, of that conflict is disputed by Respondents.

2. In opposing certiorari, Respondents place their primary reliance on this Court's decision in *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985), which Respondents suggest "unequivocally rejected the petitioner's contention. . . ." (Opp. 7). *Webb* did no such thing.

In *Webb*, this Court held that "[a]dministrative proceedings established to enforce tenure rights created by *state* law simply are not part of any proceedings to enforce § 1983." 471 U.S. at 241 (emphasis added). By contrast, in the present case, Petitioner sought to vindicate the same *federal* right before the Federal Energy Commission ("FERC") and in the district court Section 1983 action. As evident from our discussion in the Petition (Pet. 11-15), decisions of this Court before and after *Webb* make clear that recovery is appropriate for nonmandatory administrative proceedings that seek to vindicate *federal* rights or policies.

Thus, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980), fees were found awardable for largely nonmandatory litigation in state and administrative fora where plaintiffs succeeded in vindicating "federal [Title VII] policies" at the "state or local level." Likewise, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), the Court awarded fees under the Clean Air Act for the fee claimant's efforts to protect, through entirely nonmandatory participation in collateral state and administrative proceedings, the scope of a federal consent decree entered to enforce the Act. *See also North Carolina Dep't of Transportation v. Crest Street Community Council*, 479 U.S. 6, 15 (1986)("[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation.")

3. But, whether we or the Respondents are correct in interpreting this Court's decisions, the undisputed fact remains that the lower federal courts are in hopeless conflict concerning the interpretation of those decisions, and the issue arises with considerable frequency. *See* Pet. at 15-21.

4. Respondents also do not dispute that the rule adopted by the Ninth Circuit undermines other important prudential policies developed by this Court to encourage resort to federal administrative agencies for determination of issues of statutory interpretation. Under the theory articulated by the Ninth Circuit, Petitioner had "at least two choices": it could "proceed directly to court, and obtain an interpretation of FERC's authority without the benefit of a FERC opinion directly on the issue" -- thus securing attorneys' fees -- or it could "attempt to get a definitive response from FERC, in order to buttress a later trip to court" -- in the process foregoing such fees. (Pet. App. 9a).

If the Ninth Circuit's decision were allowed to stand, the lesson would not be lost on future litigants. In order to secure attorneys' fees, they will seek to litigate their claims exclusively before the federal court in the civil rights action, thus depriving the federal courts of the agency's view of the interpretation of the federal statute -- an interpretation this Court has repeatedly valued under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Avoiding the agency could thus undercut obvious federal interests in achieving uniform, competent interpretation and administration of federal regulatory schemes.

5. Finally, in Part II of the Opposition, Respondents suggest that certiorari should not be granted because the FERC proceeding, rather than the district court proceeding, "caused" the state to withdraw its order. Respondents seriously misunderstand the governing principle, and none of the cases they cite remotely

supports their argument.[1] Where administrative proceedings and the federal court action seek the same relief, it is immaterial that the relief may have been awarded in the administrative or collateral proceeding rather than in federal court. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (fees awarded under Title VII fee shifting provision for state and federal administrative proceeding, although the judgment on the merits was obtained in state court); *Sullivan v. Hudson*, 490 U.S. 877 (1989) (fees awarded to social security disability claimant, where disability benefits were awarded by the Social Security Administration in an administrative remand from federal court).

6. The frequency with which the issues presented here arise and the number of conflicting Court of Appeals decisions are not contested by Respondents; resolution of the issue by this Court is important to both government and individual litigants.

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[1] Respondents rely on *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Farrar v. Hobby*, 61 U.S.L.W. 4033 ( U.S. Dec. 15, 1992). In *Hewitt*, the Court merely held that an "interlocutory ruling that [the fee claimant's] complaint should not have been dismissed for failure to state a constitutional claim" did not satisfy Section 1988's "prevailing party" requirement. 482 U.S. at 760. In *Farrar*, the fee claimant had recovered only nominal damages upon conclusion of the civil rights litigation. The Court held that, although the claimant satisfied the "prevailing party" requirement, Section 1988's provision for "reasonable" fee awards did not support any award at all where the degree of success achieved was so minimal. Neither *Hewitt* nor *Farrar* involved, or even mentioned, the availability of fee awards for administrative or other proceedings collateral to civil rights litigation.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

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